The Burger Court Opinion Writing Database

United States v. Sioux Nation

448 U.S. 371 (1980)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 11, 1980

Re: 79-639 - United States v. Sioux Nation

MEMORANDUM TO THE CONFERENCE:

Tentatively, I lean to Harry's reading of Klein. It is one thing for Congress to try to nullify a favorable judgment and not quite the same to "revive" a "dead" claim. It can always do the latter by private bills but historically it has used the Court of Claims as its "agent" to analyze the evidence relating to damages and even broader questions which a committee of Congress is not equipped to deal with.

For the moment, I am content to wait for the opinion and perhaps that will resolve doubts.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1980

RE: 79-639 - United States v. Sioux Nation of Indians

Dear Harry:

I join.

Regards,

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 11, 1980

RE: No. 79-639 United States v. Sioux Nation

Dear Harry:

I agree.

Sincerely,

Bill

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

April 21, 1980

Re: No. 79-639, United States v. Sioux Nation

Dear Harry,

I am more than a little concerned about the impact of a decision that there was a "taking" in this case, but I remain of the view that there was. Although the issue that interests Bill Rehnquist is not a frivolous one, it was not made an issue in this case, and I agree that no purpose would be served by setting the case for reargument on this issue. In short, I adhere to my Conference vote.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

June 11, 1980

Re: 79-639 - United States v. Sioux Nation

Dear Harry:

I am glad to join your opinion for the Court.

Sincerely yours,

P.S.

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

June 16, 1980

Re: 79-639 - United States v. Sioux Nation of Indians

Dear Harry,

Regretfully, for the reasons I shall state, I am reluctant to join all of your opinion. In the first place, I have found the case a much closer one on the merits than your opinion makes it out to be. Also, the validity of the Indian Claims Commission finding that the government acted unfairly and dishonorably is not before us, and I do not entirely share the atmosphere of your draft that often casts the conduct of the government in such an unfavorable light. I would also prefer in stating the historical facts to stand on the record rather than to rely on accounts by historians and other writers whose accuracy and objectivity have not been put to the test.

I agree with your Part III and with the general conclusion stated in Part V that when judged by currently prevailing Fifth Amendment standards, the Court of Claims was correct in concluding that the government actions at issue here effected a taking for which compensation was and is due.

I shall file a statement to this effect.

Sincerely yours,

Byron

Mr. Justice Blackmun

Copies to the Conference

cmc

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice White

Circulated: 17 JUN 1980

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-639

United States, Petitioner, *v.* Sioux Nation of Indians et al. | On Writ of Certiorari to the United States Court of Claims.

[June —, 1980]

MR. JUSTICE WHITE, concurring in part and concurring in the judgment.

I agree that there is no constitutional infirmity in the direction by Congress that the Court of Claims consider this case without regard to the defense of res judicata. I also agree that the Court of Claims correctly decided this case. Accordingly, I concur in Parts III and V of the Court's opinion and in the judgment.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 11, 1980

Re: No. 79-639 - United States v. Sioux Nation

Dear Harry:

Please join me.

Sincerely,

T.M.

Mr. Justice Blackmun

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 11, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

Bill Rehnquist's memorandum of April 7, and Lewis' memorandum of April 10, prompt me to set forth my present views on the question whether Congress had the constitutional power to enact legislation requiring the Court of Claims to reach the merits of the Sioux' taking claim.

As I indicated at Conference, I believe that United States v. Klein, a case I brought up, is properly distinguishable from this case, principally on two grounds. First, the case traditionally has been read as a limitation on Congress' power to dictate how evidence in a particular case is to be judged, when that power also interferes with the constitutional authority committed to a co-equal branch -- in Klein, Congress attempted to render the President's pardon power a nullity. No such problem is presented in this case. See Hart & Wechsler, The Federal Courts and the Federal System 315-316 (2d ed. 1973). Second, in Klein, the legislation which Congress enacted had the effect of retroactively closing the doors of the Court of Claims to a party who already had been adjudged to have a legitimate claim against the United States. Here, of course, Congress' legislative action had the effect of giving a claimant against the Government a second chance to establish its claim. Arguably, legislative action by which Congress waives its right to a judgment in its favor does not present the same kind of equitable concerns that were presented in Klein.

Moreover, since Conference I have had the occasion to look into this issue a bit more closely. For the present, I am convinced that the later case of Cherokee Nation v. United States, 270 U.S. 476 (1926), is controlling on the question. The facts of that case reveal that the Cherokee had obtained a judgment against the U.S., affirmed by this Court in April, 1906, which judgment included a large amount of interest. Thereafter, in 1919, Congress passed a special act that gave

jurisdiction to the Court of Claims to hear and determine the claim of the Cherokee against the U.S. for additional interest arising out of the same substantive claim. This Court observed that "but for the special act of 1919 . . . the question here mooted would have been foreclosed as res judicata." Id., at 486. "The Court construed the special act as a waiver of the res judicata effect of the prior judgment, and concluded: "The power of Congress to waive such an adjudication is clear." Ibid. See also Pope v. United States, 323 U.S. 1, 8-10 (discussing, inter alia, Klein and Cherokee Nation).

I, of course, shall be interested in what Bill Rehnquist may come up with. For now, however, I am fairly persuaded that there is no need for reargument since our prior cases establish the authority of Congress to waive the res judicata effects of a prior judgment in the Government's favor.

In response to Lewis' concern that this case may establish a precedent that will enable Indian tribes to raise similar claims based on "takings" of a century ago, I have only a brief observation. Does not the five year statute of limitations for claims existing before August 13, 1946, established in 25 U.S.C. § 70k, obviate that concern to a significant extent?

HAB.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

April 14, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

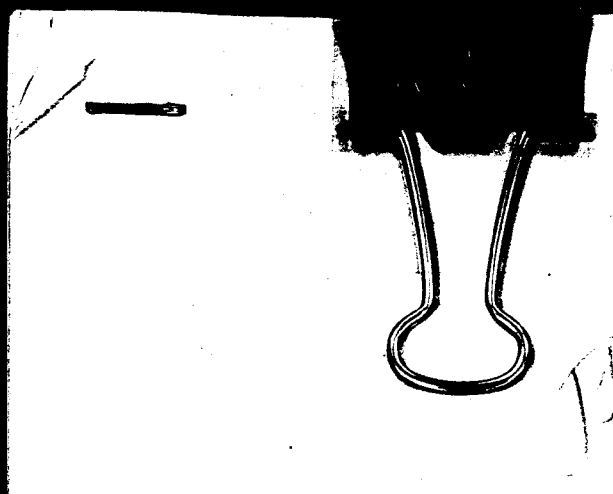
The recent correspondence prompts me to circulate this memorandum. The case has been assigned to me for an opinion. I have no desire to undertake that substantial task (I trust you all will agree it is rather substantial if the merits are to be reached), if there is a fair likelihood that a majority ultimately will conclude that Congress exceeded its authority.

I think it desirable, therefore, that we focus on that issue and count the votes. If a majority feel the way Bill Rehnquist does, the case should be reassigned. If a majority feel otherwise, at least tentatively, I shall be willing to go ahead.

As of now, I would reach the merits. The recent correspondence indicates that the Chief feels that way; that Bill Rehnquist is of the other view; and that Lewis is perhaps inclined in the other direction. I shall do nothing until the dust settles.

I might add as a postscript, that I am not very enthusiastic about setting the case for reargument. Although I think it unnecessary, I would not be opposed to requesting prompt briefing on this added issue if a majority is so inclined. There then would be a chance of getting the case down before the Summer.

Harry



To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: JUN 10 1980

Recirculated: _____

No. 79-639 - United States v. Sioux Nation

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

Pages: 1, 4, 14, 16, 19, 31, 32, 37, 39, 40

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 13 1980

Printed

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-639

United States, Petitioner, *v.* Sioux Nation of Indians et al. | On Writ of Certiorari to the United States Court of Claims.

[June —-, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866–1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.[1]

[1] The Sioux territory recogized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 13, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

Potter very appropriately inquired about the accuracy of one statement in the opinion. The statement, I agree, is confusing, but I believe it is correct. The material is at the top of page 47 of the printed copy. In order to dispel any confusion, I shall make the following additions.

1. The insertion of the word "earlier" at the end of the top line on page 47.

2. The insertion of the following after the figure "38" on the 9th line on that page:

> Some years thereafter the Senate had awarded the Indians a substantial recovery based on the latter treaty's failure to compensate the Choctaw for the lands they had ceded. Congress later enacted a jurisdictional statute which permitted the United States to contest the fairness of the Senate's award as a settlement of the Indians' treaty claim. In rejecting the Government's arguments, and accepting the Senate's award as "furnish(ing) the nearest approximation to the justice and right of the case," id., at 35, this Court observed:

HAB.

- stylistic changes, typograph- -
- ical corrections, and page 47

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Powell
Mr. Justice Rehnquist
Mr. Justice Stevens

From: Mr. Justice Blackmun

Circulated: _____

Recirculated: JUN 16 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79–639

United States, Petitioner, *v.* Sioux Nation of Indians et al. | On Writ of Certiorari to the United States Court of Claims.

[June —, 1980]

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This case concerns the Black Hills of South Dakota, the Great Sioux Reservation, and a colorful, and in many respects tragic, chapter in the history of the Nation's West. Although the litigation comes down to a claim of interest since 1877 on an award of over $17 million, it is necessary, in order to understand the controversy, to review at some length the chronology of the case and its factual setting.

I

For over a century now the Sioux Nation has claimed that the United States unlawfully abrogated the Fort Laramie Treaty of April 29, 1868, 15 Stat. 635, in Art. II of which the United States pledged that the Great Sioux Reservation, including the Black Hills, would be "set apart for the absolute and undisturbed use and occupation of the Indians herein named." *Id.*, at 636. The Fort Laramie Treaty was concluded at the culmination of the Powder River War of 1866–1867, a series of military engagements in which the Sioux tribes, led by their great chief, Red Cloud, fought to protect the integrity of earlier-recognized treaty lands from the incursion of white settlers.[1]

[1] The Sioux territory recogized under the Treaty of September 17, 1851, see 11 Stat. 749, included all of the present State of South Dakota, and parts of what is now Nebraska, Wyoming, North Dakota, and Montana.

HAB

June 20, 1980

Re: No. 79-639 - United States v. Sioux Nation of Indians

Dear Bill:

This will supplement our brief conversation on the bench this morning.

If your dissent remains as it is, I propose a new footnote (a copy of which is enclosed) to be appended at the end of the first sentence of page 49 of my opinion. Present footnote 32 on page 50 would then be renumbered accordingly to "33."

I would also add, and shall probably do it anyway, the following to the last footnote of the opinion.

> "See also R. Billington, Soldier and Brave xiv (1963) ('[t]he Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded.')"

Sincerely,

HAB

Mr. Justice Rehnquist

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 20, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation of Indians

I shall add a new footnote, a copy of which is enclosed, to be appended at the end of the first sentence on page 49 of the opinion. Present footnote 32 would then be number 33.

I shall also add the following to the last footnote of the opinion:

> "See also R. Billington, Soldier and Brave xiv (1963) ('[t]he Indians suffered the humiliating defeats that forced them to walk the white man's road toward civilization. Few conquered people in the history of mankind have paid so dearly for their defense of a way of life that the march of progress had outmoded.')"

HAB.

32/ The dissenting opinion suggests, post, at 10-13, that the factual findings of the Indian Claims Commission, the Court of Claims, and now this Court, are based upon a "revisionist" view of history. The dissent fails to identify which materials quoted herein or relied upon by the Commission and the Court of Claims fit that description. The dissent's allusion to historians "writing for the purpose of having their conclusions or observations inserted in the reports of congressional committees," id., at 11, is also puzzling because, with respect to this case, we are unaware that any such historian exists.

The primary sources for the story told in this opinion are the factual findings of the Indian Claims Commission and the Court of Claims. A reviewing court generally will not discard such findings because they raise the specter of creeping revisionism, as the dissent would have it, but will do so only when they are clearly erroneous and unsupported by the record. No one, including the Government, has ever suggested that the factual findings of the Indian Claims Commission and the Court of Claims fail to meet that standard of review.

A further word seems to be in order. The dissenting opinion does not identify a single author, non-revisionist, neo-revisionist, or otherwise, who takes the view of the history of the cession of the Black Hills that the dissent

(footnote 32 cont'd)

prefers to adopt, largely, one assumes, as an article of faith. Rather, the dissent relies on the historical findings contained in the decision rendered by the Court of Claims in 1942. That decision, and those findings, are not before this Court today. Moreover, the holding of the Court of Claims in 1942, to the extent the decision can be read as reaching the merits of the Sioux' taking claim, was based largely on the conclusive presumption of good faith toward the Indians which that court afforded to Congress' actions of 1877. See 97 Ct. Cl., at 669-673, 685. The divergence of results between that decision and the judgment of the Court of Claims affirmed today, which the dissent would attribute to historical revisionism, see post, at 10, is more logically explained by the fact that the former decision was based on an erroneous legal interpretation of this Court's opinion in Lone Wolf. See Part IV-B, supra.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 10, 1980

79-639 U. S. v. Sioux Nation

MEMORANDUM TO THE CONFERENCE:

Bill Rehnquist's memorandum of April 7 prompts me to say that although my vote at Conference - and now - is to affirm the judgment of the Court of Claims, I have never considered carefully the suggestion that Congress exceeded its lawful authority in directing the Court of Claims to disregard the defense of res judicata.

I must say, however, that in light of the case Harry brought to our attention (United States v. Klein, 13 Wall. 128), the point is not frivolous. I therefore have some uneasiness about our decision. Quite apart from the large sum of money involved in this particular case, I have wondered whether our decision will establish a precedent that will give rise to similar claims from Indian tribes that - over the past century or more - may have been persuaded or coerced to surrender lands under circumstances that now would be viewed as a "taking".

In sum, if Bill Rehnquist's further study indicates that there is indeed a substantial constitutional question as to congressional power, I could vote for a reargument on this issue. I appreciate that the possibility of reargument was suggested at Conference, and there appeared to be insufficient interest in reargument to delay the assignment of the writing of an opinion on the merits. I write now merely to express the above qualification to my otherwise positive vote to affirm.

L.F.P.

L.F.P., Jr.

ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 18, 1980

79-639 United States v. Sioux Nation

Dear Harry:

This is a reply to your memorandum of April 14.

I suppose that reargument would, as Bill Rehnquist noted, place the government is an awkward position. But I do not think Bill's point is frivolous, and certainly you are entirely right that we should make a decision on the rebriefing or reargument without further delay. I would join four for a request for briefing on this single issue. Absent such a vote, you can count on my remaining with my Conference vote.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 11, 1980

79-639 United States v. Sioux Nation

Dear Harry:

I will await Bill Rehnquist's writing on the Article III issue before making a final decision.

Your opinion is most interesting.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 20, 1980

79-639 U.S. v. Sioux Nation

Dear Harry:

Please join me.

Sincerely,

Lewis

Mr. Justice Blackmun

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 7, 1980

MEMORANDUM TO THE CONFERENCE

Re: Sioux Tribe of Indians v. United States
79-639

Because my mention of the possibility that some of our earlier cases would strongly indicate that the congressional directive to re-hear this case in the Court of Claims without regard to the defense of res judicata could run afoul of the limitations placed on Article III courts, I have done some further looking into the matter. I must confess that one of the closest cases in point I found was one which Harry suggested to me, United States v. Klein, 13 Wall. 128 (1872). As with so many other areas of the law, there are cases going both ways, but I am tentatively convinced that the Klein rationale is persuasive. Since this would represent a dissenting view, requiring vacation of the decision of the Court of Claims, and since the Chief has already assigned the case for preparation of a majority opinion affirming the Court of Claims, in the interest of orderly procedure I shall simply circulate a dissent along the above mentioned lines after the draft majority opinion circulates.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 11, 1980

Re: No. 79-639 United States v. Sioux Nation

Dear Harry:

Since a number of us seem to be bombarding one another with memoranda in this case, I take the liberty of responding to your memorandum of April 11, to make just a few preliminary points in response. United States v. Klein is unquestionably distinguishable from the congressional action taken in this case on several grounds, two of which you mention in your memorandum. Nevertheless, one of the underlying principles of the Klein decision was that finality is an essential component of Art. III decisions and that Congress may not interfere with the exercise of judicial power by stripping a judgment of its finality. I believe that this premise of Klein has survived and may have applicability to this case.

This Court in Pope v. United States, 323 U.S. 1 (1944), another case which you cite, found that the decision in Klein "rested upon the ground that . . . Congress was without constitutional authority to control the exercise of . . . judicial power . . . by requiring this Court to set aside the judgment of the Court of Claims." Id. at 8. The Court in Pope found that the congressional act in issue there did not conflict with Klein because properly construed, it did not "set aside [a prior] judgment or . . . require a new trial of the issues . . . which the court had resolved against petitioner." The Court specifically found that because Congress had not set aside a final judgment of an Art. III court, the Act did not "encroach upon the judicial function which the Court of Claims had previously exercised." The Court was careful to reserve the question of whether there would be unconstitutional encroachment upon that function if Congress had set aside the prior judgment of the Court of

[redacted]nd ordered a new trial (as opposed to forming a [redacted]tutory obligation). The Court stated:

> "We do not consider just what application the principles announced in the Klein case could rightly be given to a case in which Congress sought, pendente lite, to set aside a judgment of the Court of Claims in favor of the government and to require relitigation of this suit. For we do not construe the [Act] as requiring the Court of Claims to set aside the judgment in the case already decided or as changing the rules of decision for the determination of a pending case." (Emphasis added.)

Thus Pope reserves the very question which you state was decided by Cherokee Nation v. United States, 270 U.S. 476 almost twenty years earlier. While I was aware of the Cherokee Nation case, I am not satisfied that it should be found controlling in this situation. In Cherokee, the Court found that Congress passed a statute permitting relitigation so that the Cherokees could present a theory that they were entitled to interest on a compounded basis, rather than merely the simple interest which they were awarded in a prior Court of Claims decision. The Court in the Cherokee case states that the theory of computing interest which the Cherokees were asserting in the second action was not "presented either to the Court of Claims or to this Court. It is a new argument not before considered." 270 U.S. at 486. Thus Cherokee did not present the precise issue of whether Congress can require an Art. III Court to adjudicate the identical issue more than one time.

I am not convinced that Congress has done no more than assert a litigant's waiver in this case. Congress in fact has required the Court of Claims to adjudicate an issue which it has already adjudicated. While other litigants

[redacted]so be able to waive res judicata, I do not think [redacted] court would feel obligated to exercise its [redacted]sdiction under such circumstances. Thus I think the [redacted]gressional action in this case is more appropriately [redacted]aracterized as a congressional grant of a new trial on [redacted] issue which has been finally decided. I am not ready [redacted]o conclude that simply on the authority of Cherokee Nation there is no invasion of judicial powers when Congress declines to respect the finality of this Court's decisions, sets aside a valid judgment, and orders a new trial on an issue previously decided in an Article III Court. If we were to enter a judgment in favor of the United States in this case, could Congress order the Court of Claims to hear the issue once again? Under your reading of Cherokee Nation, I think the answer to that question would have to be yes.

I had not intended to articulate my position in this case as of yet, since it is still in the formative stages, but I did want to express my view that the question should be viewed as quite substantial despite the decision in Cherokee Nation. If the Court in Klein was right that Congress does not have the power to set aside a final judgment of an Art. III Court, then I think this case may well be governed by Klein. I think the Court in Pope wisely reserved the question presented in this case and I think we should give it the consideration it deserves.

Sincerely,

WHR/mm

Mr. Justice Blackmun

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 14, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

I fully agree with Harry's most recent memorandum in this case dated April 14th, and especially with his observation that the case should not be set for reargument. After all, the Solicitor General is obligated to defend an Act of Congress, and setting it for reargument would place the government in the very awkward position of asserting the Act's unconstitutionality, or of giving us no adversary presentation.

Sincerely,

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 21, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 - United States v. Sioux Nation

I think I appreciate the points both Harry and Lewis have made in their recent correspondence on this subject. Given the convoluted nature of the proceedings, I think the awkwardness of the position of the government to which Lewis refers in his letter to Harry of April 18th is apparent; I would, with Lewis, join for re-argument with the stipulation that an amicus be appointed to brief and argue the Article III issue.

Sincerely,

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: 13 JUN 1980

Recirculated: _____

No. 79-639 United States v. Sioux Nation

MR. JUSTICE REHNQUIST, dissenting.

In 1942, the Sioux Tribe filed a petition for certiorari requesting this Court to review the Court of Claims' ruling that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands--an exchange Congress believed to be in the best interests of the Sioux and the nation. This Court declined to review that judgment. Sioux Tribe v. United States, 97 Ct. Cl. 613 (1942), cert. denied, 318 U.S. 789 (1943). Yet today the Court permits Congress to reopen that judgement which this Court rendered final upon denying ceriorari in 1943, and proceeds to reject the 1942 Court of Claims' factual interpretation of the events in 1877. I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding, that there is no judicial principle justifying the decision to afford the respondents an additional opportunity to litigate the same claim, and that the Court of Claims' first interpretation of the events in 1877 was by all accounts the more realistic one. I therefore dissent.

I

In 1920, Congress enacted a special jurisdictional act, 41 Stat. 738, authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims. The Sioux filed suit claiming that the 1877 Act removing the Black Hills from

79-639

Supreme Court of the United States

Memorandum

6/20/80

-----------------------------------, 19-------

Harry —

Back in my office [illegible] my [illegible] notice [illegible] called, one of your clerks called Maureen Mahoney, my clerk, to say that one of the sentences inaccurately characterizes your opinion. She is out of the office today. He left it with him (?) to work out Monday. If you would prefer that the principals work this out today, I am available —

WHR

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

June 20, 1980

MEMORANDUM TO THE CONFERENCE

Re: No. 79-639 United States v. Sioux Nation

Upon further reflection, I have decided to delete the first full paragraph on page 11 of the "Wang" draft of my dissenting opinion in this case.

Sincerely,

2,4-7,9-12

To: The Chief Justice
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice White
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Stevens

From: Mr. Justice Rehnquist

Circulated: _____

Recirculated: 27 JUN 1980

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 79-639

United States, Petitioner, v. Sioux Nation of Indians et al. | On Writ of Certiorari to the United States Court of Claims.

[June —, 1980]

MR. JUSTICE REHNQUIST, dissenting.

In 1942, the Sioux Tribe filed a petition for certiorari requesting this Court to review the Court of Claims' ruling that Congress had not unconstitutionally taken the Black Hills in 1877, but had merely exchanged the Black Hills for rations and grazing lands—an exchange Congress believed to be in the best interests of the Sioux and the Nation. This Court declined to review that judgment. *Sioux Tribe* v. *United States*, 97 Ct. Cl. 613 (1942), cert. denied, 318 U. S. 789 (1943). Yet today the Court permits Congress to reopen that judgment which this Court rendered final upon denying certiorari in 1943, and proceeds to reject the 1942 Court of Claims' factual interpretation of the events in 1877. I am convinced that Congress may not constitutionally require the Court of Claims to reopen this proceeding, that there is no judicial principle justifying the decision to afford the respondents an additional opportunity to litigate the same claim, and that the Court of Claims' first interpretation of the events in 1877 was by all accounts the more realistic one. I therefore dissent.

I

In 1920, Congress enacted a special jurisdictional act, 41 Stat. 738, authorizing the Sioux Tribe to submit any legal or equitable claim against the United States to the Court of Claims. The Sioux filed suit claiming that the 1877 Act removing the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

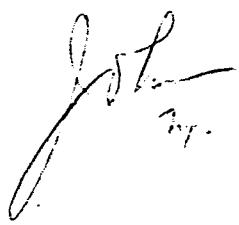
June 11, 1980

Re: 79-639 - United States v. Sioux Nation of Indians

Dear Harry:

Please join me.

Respectfully,



Mr. Justice Blackmun

Copies to the Conference